BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. GALLO GLASS, Respondent. JAMES H. ALLEN, Complainant.	Case No. E 99-00-C-0114-00 C 00-01-021 02-16-P DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. Pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a), the Commission designates this decision as precedential.

The Commission corrects the following minor typographical errors in the proposed decision. On page 4, finding of fact 13, and page 5, finding of fact 18, the references to 11352 should be 11350. On page 9, section B, line 10, the words "may be taken" should be deleted. (Cal. Code Regs., tit. 2, §7434, subd. (a)(3).)

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and

related papers shall be served on the Department, the Commission, respondent, and complainant.

DATED: October 1, 2002

GEORGE WOOLVERTON	HERSCHEL ROSENTHAL
LISA DUARTE	CATHERINE F. HALLINAN
HELEN R. MARS	

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OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. GALLO GLASS, Respondent.	Case No. E 99-00-C-0114-00 C 00-01-021 PROPOSED DECISION
JAMES H. ALLEN, Complainant.	

Hearing Officer Ann M. Noel heard this matter on behalf of the Fair Employment and Housing Commission on May 21 through 23, 2002, in Modesto, California. James A. Otto, Staff Counsel, represented the Department of Fair Employment and Housing. Nancy Abell, Esq., and Stephanie Doria, Esq., of Paul, Hastings, Janofsky & Walker, represented respondent Gallo Glass. Complainant James H. Allen and William Holmes, Vice-President of Operations, a representative for respondent Gallo Glass, were present throughout the hearing. George Skol, Esq. and Joni Criscione, counsel and a paralegal, respectively, for respondent Gallo Glass, were present for part of the hearing.

The Commission received the hearing transcripts on June 13, 2002. On July 26, 2002, the Department of Fair Employment and Housing filed a "Motion to Strike All Testimony Regarding Complainant's Alleged Criminal Record." On July 29, 2002, both respondent and the Department timely filed their post-hearing briefs, and the case was submitted on that date.

After consideration of the entire record, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On August 3, 1999, James Henry Allen (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) alleging that his employer, Gallo Glass, had, within the preceding year, discriminated against him on the basis of his race (African American) by suspending him and then terminating his employment, in violation of the Fair Employment and Housing Act (Act). (Gov. Code §12900, et seq.) Complainant alleged that Gallo Glass terminated his employment after he had been convicted of a felony, while similarly situated non-African American employees were not terminated.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On August 2, 2000, Dennis W. Hayashi, in his official capacity as the Director of the Department, issued an accusation against Gallo Glass (respondent or respondent Gallo Glass). The accusation alleged that respondent suspended and then terminated complainant, an African American, after complainant pled guilty to a criminal charge, while non-African American employees with similar or more egregious criminal convictions were not terminated. The Department asserted that respondent's actions thereby provided complainant inferior terms, conditions and privileges of his employment based on race, and thereby violated Government Code section 12940, subdivision (a). The accusation also alleged that respondent violated Government Code section 12940, subdivision (i), by failing to take all reasonable steps to prevent discrimination from occurring.

3. Respondent Gallo Glass manufactures wine bottles for Gallo Wines and other wineries. Respondent has a manufacturing facility in Modesto, California (the "Modesto facility") where it employs approximately 800 employees. The nature of respondent's business form, whether a corporation, partnership or other was not established in the record. Respondent is an "employer" within the meaning of Government Code section 12926, subdivision (d).

4. Employees at the Modesto facility take raw materials, melt them into molten glass, and transfer the mixture to "glass forming machines" to mold wine bottles.

5. On March 18, 1980, respondent hired complainant to work at its Modesto facility. Complainant apprenticed 4,000 hours to become a machine operator on a glass forming machine. Thereafter, complainant worked as a machine operator for most of his employment with respondent. Complainant also worked as a relief upkeep operator, as needed.

6. Respondent's machine operators each operate a glass forming machine. Each machine operator continuously monitors and lubricates the glass forming machine, tests bottles for quality control, and makes minor machine adjustments to maintain bottle quality. Respondent employs upkeep operators who work in tandem with machine operators. With the assistance of the machine operator, respondent's upkeep operator performs more

sophisticated, major maintenance on the machines and also makes adjustments to ensure even glass quality.

7. Machine or upkeep operators typically work on one 21-inch section of a machine while adjacent sections continue to run. Any misstep by a machine or upkeep operator in failing to follow correct maintenance procedures or avoiding touching hot machinery can result in life-threatening burns, maiming, or other injuries to the careless operator or his co-workers, serious fire or other damage to the glass forming machines, and $1,000 per hour of lost glass production if the machine is incapacitated. The glass forming machines cost approximately $2 million dollars each, including the labor to set up the machine.

8. In the 1970's and early 1980's, respondent's Modesto facility recognized that it had a problem with employees using drugs both on and away from the job. Respondent was concerned that this would endanger the safety of its workers and the quality of the glass bottles it produced. In 1986, respondent began drug testing new hires. Respondent also instituted in 1986 an anti-drug policy that provided that respondent would terminate an employee if the employee was convicted of a drug-related offense. Respondent's written company policy provided that "violation of any criminal law" was cause for immediate suspension pending discharge.

9. Respondent's hourly employees, including machine and upkeep operators, were represented by Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, Local Union No. 17 (Local 17). Under collective bargaining agreements with Local 17 since at least 1996, respondent has had a "probable cause" testing policy authorizing respondent to test employees for drugs based on employees' actions in the workplace that might indicate drug use. Employees found to be using drugs on respondent's premises were terminated. Respondent trained its supervisors to look for signs of addiction, such as excessive absenteeism, and to encourage or mandate employees to utilize its employee assistance plan for drug treatment if drug use was suspected.

10. Since 1991, William Holmes, respondent's Vice-President of Operations, has been the plant manager at respondent's Modesto facility with responsibility for termination decisions.

11. On November 26, 1996, the Modesto Police Department arrested complainant for possession of cocaine for sale. On December 18, 1996, the Modesto Police Department filed a criminal complaint against complainant alleging two felony counts of sale of cocaine (Health & Saf. Code §11352, subd. (a)), arising from complainant's arrest on November 26, 1996 (the "1996 arrest"). Shortly thereafter, respondent's personnel learned through the newspaper about complainant's arrest. Plant manager William Holmes asked respondent's security personnel to obtain written documentation and was subsequently provided a copy of the criminal complaint from the Stanislaus County Superior Court.

12. On January 13, 1997, Williams Holmes held a "verbal warning" meeting with complainant, Local 17 President Dave Hoffman, respondent's Human Resources Manager

Connie Rush, and complainant's immediate supervisors, Dave Joliff and Phil Alves. At the meeting, Holmes informed complainant that he knew of complainant's 1996 arrest, that complainant would now be monitored at work, and if complainant was found guilty of the criminal charges, respondent would discharge him. Complainant told Holmes that he was falsely accused, and expected to be cleared of the charges. Holmes said that if the charges were dismissed, complainant's continued employment was assured. Thereafter, complainant continued to work for respondent pending resolution of his criminal court case.

13. On July 27, 1998, after a number of court appearances and continuances, complainant pled guilty in Stanislaus County Superior Court to one felony count of Health and Safety Code section 11352, possession of cocaine, based on his 1996 arrest. The Court sentenced complainant to 60 days in county jail beginning October 5, 1998, three years' felony probation, fines, drug education and AIDS training. The Court also suspended complainant's driver's license for six months and ordered him to register as a "controlled substance offender" with his local police department.

14. Respondent's security personnel monitored complainant's 1996 criminal case. On or about August 12, 1998, respondent learned of complainant's July 27, 1998, felony drug possession conviction. Based on this information, on August 15, 1998, respondent notified complainant that he was suspended for three days, pending discharge for violation of company rules.

15. On August 18, 1998, William Holmes called complainant to a disciplinary meeting. Attending the meeting with Holmes and complainant were Local 17 President Dave Hoffman, respondent's Human Resources Manager Connie Rush, and complainant's immediate supervisors Dave Joliff and John Avila. Complainant continued to maintain his innocence to Holmes but said that he had pled guilty because he was afraid that a jury would be "stereotyped" and would convict him. Complainant gave Holmes a letter from his criminal defense attorney, Robert Orenstein. Orenstein stated in the letter that complainant's 1996 arrest had resulted in a drug possession conviction, with a 60-day jail sentence, but that in Orenstein's experience such sentences usually could be satisfied by the county's Alternative Work Program. At the disciplinary meeting, Hoffman stated to Holmes that complainant should be retained if he did not have to serve any time in jail. Holmes responded that respondent had consistently taken a "hard stand" on drug charges, respondent's company rules prohibited violating "any criminal law," complainant had pled guilty to possessing cocaine, and therefore, respondent was discharging complainant. At the conclusion of the meeting, Holmes terminated complainant's employment based on his July 27, 1998, conviction.

16. Shortly thereafter, on August 18, 1998, Dave Hoffman, on behalf of Local 17, filed a grievance with respondent seeking complainant's reinstatement. Hoffman asserted that respondent should not discharge employees for "situations that occur in their private life" unless a conviction had a direct effect on an employee's employment, or an employee was convicted of a violent offense where the employee posed a threat to his or her fellow employees.

17. On August 21, 1998, William Holmes denied Local 17's grievance, stating in writing that respondent regretted terminating an employee with many years of service but that the termination was consistent with respondent's "hard stand" against drug-related convictions. Holmes noted that respondent had terminated other employees for other drug-related offenses and had prevailed in a 1983 arbitration with Local 17 over the termination of an employee for a drug-related offense. On September 17, 1998, Holmes also wrote a letter to Joseph Mitchell, Sr., Local 17's International Vice President, reiterating his August 21, 1998, comments regarding terminating complainant's employment. Thereafter, Local 17 decided not to arbitrate complainant's grievance.

18. Twelve days after complainant's guilty plea for his 1996 arrest, on August 8, 1998, Modesto Police Department arrested complainant for possession of cocaine, being under the influence of a controlled substance, and illegal possession of a syringe (the "1998 arrest"). On August 18, 1998, Modesto Police Department charged complainant with felony possession of cocaine (Health & Saf. Code, §11352), misdemeanor under the influence of cocaine, and misdemeanor possession of a syringe.

19. On November 2, 1998, complainant pled guilty to one felony count of possession of cocaine from the 1998 arrest, and was assigned to attend Stanislaus County's Drug Court program, in lieu of a county jail sentence. Complainant participated in the Drug Court program. Thirteen months later, on December 2, 1999, Stanislaus County Superior Court Judge, the Honorable Donald E. Shaver, wrote a letter on complainant's behalf to William Holmes. Judge Shaver wrote that, as of November 2, 1998, complainant had attended drug court and noted that complainant had submitted "clean tests" for drugs since November 5, 1998.

20. Complainant completed the Drug Court program and on January 3, 2000, Stanislaus County Superior Court dismissed complainant's convictions on both his 1996 and 1998 arrests. The court expunged the records of complainant's arrests and convictions pursuant to Penal Code section 1203.4.

21. In the ten years prior to complainant's discharge, three of respondent's employees had been convicted of felony criminal charges. Respondent was aware of these convictions. Respondent terminated two employees, and accepted the resignation of one employee in lieu of discharge. William Holmes participated in all these termination decisions. Prior to Holmes' tenure as plant manager, respondent also retained one employee who had been convicted of felony charges. These employees and their circumstances were:

a. In July 1989, employee Vincent Norman Rezac, a Caucasian, was arrested for vehicular manslaughter, driving while intoxicated, and driving with blood alcohol level greater than .10 percent. He pled guilty to those charges in February 1990 and served eight months of nighttime service at the county jail. He continued to work for respondent during the day. Rezac told his supervisors that he had been arrested and convicted of involuntary manslaughter but did not tell them that he had also been arrested for, and pled guilty to,

driving while intoxicated. Holmes played no role in the decision to retain Rezac after he pled guilty. As of the date of hearing, Rezac remained employed with respondent.

b. Sometime after William Holmes became plant manager in 1991, respondent accepted the resignation in lieu of discharge of employee Warren Ford, a Caucasian, after a criminal conviction for drugs.

c. In January 1994, employee Doug Ball, a Caucasian, was arrested for sale and possession for sale of methamphetamine, driving while intoxicated, and driving with a blood alcohol level greater than .10 percent. In February 1994, respondent's representatives met with Ball and told him that he would be discharged if convicted. In September 1994, Ball pled guilty to sale of methamphetamine and driving while intoxicated. Respondent discharged him shortly thereafter. In October 1994, Ball's criminal defense attorney wrote to respondent and asked that Ball's discharge be stayed, stating that Ball's case was on appeal and thus the charges were not final. Holmes refused to reverse or stay the discharge.

d. In January 1994, employee Stephen McPhail, a Caucasian, was arrested for possession for sale of methamphetamine, with various enhancements, and possession of marijuana for sale. In February 1994, respondent's representatives met with McPhail to warn him that he would be discharged if convicted. In March 1995, respondent suspended McPhail pending discharge. In April 1995, McPhail pled guilty to possession of methamphetamine and marijuana for sale. Sometime shortly thereafter, respondent terminated McPhail's employment because of his criminal conviction.

22. In the ten years prior to complainant's discharge, respondent also terminated three employees who appeared under the influence of drugs or who possessed drugs while at work. Respondent accepted the resignation of a fourth employee in lieu of discharge for refusal to take a drug test at work. These employees and their circumstances were:

a. In February 1986, a supervisor discovered employee Mike Ringgenburg, a Caucasian, with a white powder substance that the supervisor suspected was cocaine. When the supervisor confronted Ringgenburg and asked him to hand over the powder, Ringgenburg threw the substance on the ground. Respondent thereafter suspended and then discharged Ringgenburg.

b. Sometime after William Holmes became plant manager in 1991, he discharged employee Glenda Pope, a Caucasian, for testing positive for methamphetamines at work.

c. In June 1994, a supervisor found methamphetamine in the personal property of employee Randall Hutcheson, a Caucasian. In July 1994, Holmes terminated Hutcheson's employment. Local 17 arbitrated his discharge. The arbitrator upheld the discharge.

d. In August 1997, respondent asked employee Mary McKay, a Caucasian, to take a probable cause drug test. She refused and resigned in lieu of being discharged for failing to take the test.

23. The Department also presented evidence about three other employees, Terry Marshall Smith, Larry Gene Devine, and Alan Dale Cole, who had been arrested and/or convicted of various offenses in the ten years prior to complainant's termination. There was no evidence in the record to establish that respondent was aware of any of their arrests or convictions. Smith and Cole are Caucasian. The race of Devine was not established in the record. Respondent did not discharge these employees.

24. Respondent has an "Equal Employment Opportunity Policy" that provides that it follows non-discriminatory employment practices, recruits applicants solely on the basis of their qualifications, and equally administers its personnel practices and procedures. The policy provides that respondent will not tolerate any harassment or discrimination in the workplace. Any employee found in violation of the policy is subject to disciplinary action, up to and including dismissal. Respondent provides anti-harassment and anti-discrimination training to its new hires, current employees, and supervisory personnel.

DETERMINATION OF ISSUES

Post-Hearing Motions

A. The Department's Motion to Strike

In a July 26, 2002, post-hearing "Motion to Strike All Testimony Regarding Complainant's Alleged Criminal Record," the Department asserts that the Hearing Officer must strike all evidence of complainant's 1996 and 1998 arrests and subsequent convictions, pursuant to Penal Code section 1000, et seq. Penal Code section 1000, et seq. provides for a "deferred entry of judgment program" for first-time drug offenders and expungement of a defendant's criminal record, pursuant to Penal Code section 1000.4, if the defendant successfully completes the program (hereafter "drug diversion program").

The Department's Motion necessarily assumes that complainant's January 3, 2000, completion of the drug diversion program reaches back in time to affect the legitimacy of respondent's termination decision in August 1998, some 16 months earlier. The Department cites no authority in support of that notion. To the contrary, an employer can lawfully terminate an employee based on the employee's arrest record prior to the successful completion of drug diversion. (See *Sandoval v. State Personnel Board* (1990) 225 Cal.App.3d 1498, 1503-4; *B.W. v. Board of Medical Quality Assurance* (1985) 169 Cal.App.3d 219, 229.) The Department does not address these cases in either its Motion to Strike or its closing brief.

Notably, much of the testimony about complainant's 1996 and 1998 convictions that the Department now seeks to strike was elicited by the Department staff counsel, from his own witnesses—including complainant, complainant's criminal defense attorney Robert

Orenstein, and Department consultant Julie Saldana—on direct and redirect examination. Moreover, Department counsel had no objection or stipulated to the introduction of documentary exhibits, such as complainant's 1996 and 1998 criminal records and the transcript of complainant's July 27, 1998, guilty plea. [1] The Department provides no coherent argument why evidence it introduced or did not object to should now be stricken from the record.

The Department's Motion to Strike asserts that the provisions of Penal Code section 1000, et seq. are applicable to complainant. The Department introduced no evidence to support that assertion. To the contrary, the evidence showed that after complainant completed Drug Court on January 3, 2000, Stanislaus County Superior Court expunged complainant's criminal records pursuant to Penal Code section 1203.4, not Penal Code section 1000.4.[2] The Minute Order from that date documents this, and complainant's criminal defense attorney, Robert Orenstein, so testified. [3]

The Department also moved to strike the testimony of Stanislaus County Deputy District Attorney Donna Frenchie-Reeves. Respondent has no objection to this request. At hearing, Frenchie-Reeves testified about complainant's July 27, 1998, conviction after refreshing her recollection from confidential District Attorney documents. When the Department asked to see those documents, Frenchie-Reeves refused to allow the Department to inspect or read them. "[I]f a witness. . . while testifying . . . uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken." (Evid. Code, §771, subd. (a).) Frenchie-Reeves' testimony will be stricken from the record.

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[1] The Department also moves to strike a Stanislaus County's Drug Court "Order of Discharge" for complainant. Yet the Department contradicts itself in its separate July 26, 2002, "Request for Judicial Notice," where it asks the Commission to take "judicial notice" of the same Order of Discharge.

[2] Penal Code section 1203.4 allows the court to dismiss a defendant's criminal conviction when a defendant satisfactorily completes the conditions of his probation. (Pen. Code, §1203.4, subd. (a).) Expungement of a conviction under section 1203.4 "was never intended to obliterate the fact that the defendant has been finally adjudged guilty of a crime." (*Adams v. County of Sacramento* (1991) 235 Cal.App.3d 872, 873, modified, rev. denied.). Furthermore, a section 1203.4 expungement does not prevent an employer from considering a later dismissed conviction as the basis for terminating an employee. (See *Meyer v. Board of Medical Examiners* (1949) 34 Cal.2d 62, 67; *In re Phillips* (1941) 17 Cal.2d 55, 61.)

[3] The Department's Motion to Strike attempts to make its case first, by misstating that complainant was eligible for, and completed, the drug diversion program. Department counsel misstates that complainant was charged in 1996 with simple cocaine possession (Health & Saf. Code, §11352), a divertible offense under the drug diversion program, rather than possession of cocaine for sale (Health & Saf. Code, §11352(a)), a non-divertible crime. Second, Department counsel moves to strike all evidence that contradicts this misstatement and that establishes that complainant was not eligible for the drug diversion program, such as Exhibit B [complainant's 1996 arrest record] and testimony from his own witness, Robert Orenstein [testifying that complainant's criminal convictions were dismissed pursuant to Penal Code section 1203.4, not Penal Code section 1000.4].

The Department's Motion to Strike lacks merit and, with the exception of Donna Frenchie-Reeves' testimony, is denied.

B. The Parties' Requests for Official Notice

In their post-hearing briefs, both the Department and respondent ask the Hearing Officer to take "judicial notice" of various documents not introduced at hearing. The Department first asks for "judicial notice" of "Stanislaus County Local Court Rules, rule 4.20" (hereafter "Local Court Rule 4.20"). Respondent Gallo Glass opposes "judicial notice" of Local Court Rule 4.20 on the basis that the rule was enacted one year after complainant's discharge.

The Commission may take official notice may be taken of any California rules of court or court records, if the parties are notified of the matters to be noticed and are given a reasonable opportunity to refute the notice of these matters. (Cal. Code Regs., tit. 2, §7431; Evid. Code, §452.) Requests by the parties for "judicial notice" will be construed as requests for official notice. Any document to be given official notice must be relevant to a material issue. (See *American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 441, fn. 7; *People ex. rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.) The burden is on the party requesting official notice to supply the Hearing Officer with sufficient, reliable, and trustworthy sources of information about the document. The Hearing Officer is not required to seek out on her own initiative "indisputable sources of information." (*People v. Moore* (1997) 59 Cal.App.4th 168, 177, as modified.)

Local Court Rule 4.20, supplied by the Department, indicates that the rule was enacted one year after complainant's discharge. The Department has failed to establish when the rule became effective, and thus the relevance of the document. Thus, its request for official notice of Local Court Rule 4.20 is denied.

Second, the Department also seeks official notice of the "Stanislaus County Superior Court Order of Discharge, dismissing Case Numbers 199519 and 71637" after completion of the Stanislaus County Drug Court Program (hereafter, "Order of Discharge"). Notwithstanding this request, the Department seeks to strike the same document in a separate filing. (The Department's July 26, 2002, Motion to Strike; *cf. supra*, pg. 8, fn. 1.) Respondent does not oppose official notice of this document. The Department has given contradictory requests regarding whether it wants this document admitted or excluded. Thus, the Hearing Officer declines to take official notice of this document.

Respondent asks the Hearing Officer to take official notice of a "Stanislaus County Deferred Judgment Drug Program Checklist, P.C. §1000," a Stanislaus County District Attorney checklist required by Penal Code section 1000, subdivision (b) and filed with the Superior Court, to ascertain complainant's eligibility after his 1998 arrest for the drug diversion program (hereafter "Penal Code §1000 Drug Program Checklist"). The checklist states that complainant was not eligible for drug diversion because of his prior 1996 arrest.

The Department has filed no objection to this request. Respondent should have filed this document at hearing, when respondent and the Department would have had an opportunity to question the District Attorney who prepared the document and thus establish the reliability of the document. Therefore, the Hearing Officer declines to takes official notice of the Penal Code §1000 Drug Program Checklist.

Liability

A. Race Discrimination

The Department asserts that respondent violated Government Code section 12940, subdivision (a), by suspending and then terminating complainant, an African American, on the basis of race. The Department asserts that William Holmes' animus and respondent's intentional discrimination can be inferred by comparing complainant's disparate treatment with respondent's failure to terminate similarly situated non-African American employees.[4]

Respondent asserts that its decision to terminate complainant followed a consistent policy applied by plant manager William Holmes. Respondent states that the policy is to terminate any employee, regardless of race, found guilty of a felony criminal conviction involving drugs or alcohol.[5] Thus, respondent contends the Department did not establish a causal connection between complainant's race and his termination.

Government Code section 12940, subdivision (a), makes it an unlawful employment practice to terminate an employee because of race. Discrimination is established if it is determined that a preponderance of the evidence demonstrates a causal connection between complainant's race and his discharge by respondent. (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 149-150; *Heard v. Lockheed Missiles & Space Co., Inc.* (1996) 44 Cal.App.4th 1735, 1751; W*atson v. Dept. of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1290; *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1317; *Dept. Fair Empl. & Hous. v. Church's Fried Chicken, Inc.* (1990) No. 90-11, FEHC Precedential Decs., 1990-91, CEB 5, pp. 9-10.) It need not be shown that complainant's race was the sole or even the dominant cause of his adverse treatment. Intentional discrimination is established if the Department establishes that his race was one of the factors that influenced respondent's action against him. (Gov. Code, §12940, subd. (a); *Watson v. Dept. of Rehabilitation, supra,* 212 Cal.App.3d at p.1290; *Dept. Fair Empl. & Hous. v. Church's Fried Chicken, Inc., supra,* 1990-91, CEB 5, at p. 10.)

[4] The Department presented no evidence of any race-based comments or animus of William Holmes, the decision maker in terminating complainant's employment. Indeed, complainant and Local 17's President Dave Hoffman both testified that Holmes was a "straight shooter" who had never exhibited any animus on the basis of race.

[5] Respondent maintains that it adopted this policy because of the danger to the employee, co-workers, and plant property of employees impaired by drugs or alcohol.

"In most disparate treatment employment discrimination cases, the plaintiff will lack direct evidence of the employer's discriminatory intent, which is a necessary element to prevail." (*Mixon v. Fair Employment & Housing Com., supra*, 192 Cal.App.3d at p. 1317; *Heard v. Lockheed Missiles & Space Co., supra,* 44 Cal.App.4th at p. 1749; *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 662.) Racial discrimination can nonetheless be inferred, if the Department demonstrates that complainant was a member of a protected group, African American, that he was discharged from employment, and that similarly situated non-African Americans were treated differently. (*Dept. Fair Empl. & Hous. v. Church's Fried Chicken, Inc., supra*, 1990-91, CEB 5, at p. 10.)

Respondent and the Department differ on which employees are considered "similarly situated." The Department asserts that several employees with criminal convictions retained before William Holmes' tenure as plant manager, including Vincent Norman Rezac and two employees retained in the 1970's are similarly situated to complainant.[6] The Department also includes in this category several employees—Terry Marshall Smith, Larry Gene Devine, and Alan Dale Cole—whose arrests or convictions were unknown to respondent.

Respondent argues that those "similarly situated" should include only employees whom William Holmes terminated, since he is the plant manager and decision maker accused of racial animus. Respondent also argues that only employees who had convictions respondent knew about are "similarly situated." Respondent asserts that if it did not know of an employee's criminal conviction, no inference could be drawn of disparate treatment for failing to terminate that employee.

A disparate treatment violation is made out when an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion, such as race. (*E.E.O.C. v. Metal Service Co.* (3rd Cir. 1990) 892 F.2d 341, 347; see *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 335-36, fn. 15.) "Similarly situated" means that the compared employees are comparable "in all relevant aspects." (See *Kline v. City of Kansas City Fire Dept.* (8th Cir. 1999) 175 F.3d 660, 670-71; *Ercegovich v. Goodyear Tire & Rubber Co.* (6th Cir. 1998) 154 F.3d 344, 352; *Holifield v. Reno* (11th Cir. 1997) 115 F.3d 1555, 1563; *Shumway v. United Parcel Service* (2d Cir. 1997) 118 F.3d 60, 64; *Dartmouth Review v. Dartmouth College* (1st Cir. 1989) 889 F.2d 13, 19.)[7] The test is whether a "prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists

[6] The Department presented evidence of two employees, Max Olivera, an Hispanic, convicted "in the 1970's" of receiving stolen property, and Michael Rider, a Caucasian, who allegedly was convicted for possession of a controlled substance in 1972. There was no direct testimony about Rider; his conviction was mentioned in a 1982 arbitration for another employee. These two convictions are too remote in time for Olivera and Rider to be considered "similarly situated" to complainant. Furthermore, the testimony about Rider was hearsay and uncorroborated. (See Cal. Code Regs., tit. 2, §7429, subd. (f)(4).)

[7] Although FEHA and federal anti-discrimination laws differ in important respects, federal authorities can be considered in interpreting the analogous provisions of the FEHA where their objectives are identical. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 606.)

similarly situated." (*Ibid.*) In a discipline or termination cases, the question is whether "similarly situated employees who went undisciplined engaged in comparable conduct." (*Graham v. Long Island Railroad* (1st Cir. 2000) 230 F.3d 34, 40.)

The evidence established that since William Holmes's became plant manager in 1991, respondent has uniformly discharged all employees with known felony drug convictions as well as those employees found with drugs on the premises. Respondent terminated or accepted the resignation of three employees convicted of felony drug offenses, Doug Ball, Stephen McPhail and Warren Ford. Respondent also terminated or accepted the resignation in lieu of discharge of three employees caught on the premises with drugs, Glenda Pope, Randall Hutcheson, and Mary McKay.[8] All of these employees are Caucasian.

Respondent employees Alan Dale Cole and Terry Marshall Smith testified at hearing that they had kept their jobs after being criminally charged. Yet, Holmes testified that he had no knowledge of Cole's or Smith's criminal charges or convictions. Both employees verified that respondent did not know about their criminal cases. Likewise, there was no evidence presented that respondent knew of the criminal conviction of a third employee mentioned by the Department but who did not testify, Larry Gene Devine. Cole and Smith are Caucasian. Devine's race was not established in the record.

The Department asserts for the first time in its post-hearing brief that "respondent had documentation" of the "convictions" of Cole and Smith. The Department introduced no evidence at hearing to substantiate this assertion. Thus, these employees are not "similarly situated" for proving racial animus. If respondent did not know of their convictions, then respondent had no reason to terminate their employment.

The Department presented evidence about one respondent employee, Vincent Norman Rezac, a Caucasian, who was potentially similarly situated to complainant. In 1990, Rezac was convicted of two felonies, involuntary manslaughter and driving while intoxicated. Respondent's then management knew only of Rezac's conviction for involuntary manslaughter. William Holmes was not at that time the Modesto facility plant manager, and played no role in the decision to retain Rezac. Rezac's retention, by a decision maker other than Holmes, based on an incomplete understanding of his charges, remote in time to complainant's termination, does not support an inference of race discrimination for complainant's discharge.

The Department did not demonstrate that there were any employees of any race similarly situated to complainant who were convicted of felony drug offenses, but not discharged by respondent. Thus, the Department did not establish that respondent violated Government Code section 12940, subdivision (a).

[8] Prior to Holmes's tenure as plant manager, respondent also terminated Caucasian employee Mike Ringgenburg for possession of drugs at the Modesto facility in 1986.

B. Failure to Take All Reasonable Steps

The Department also alleges that respondent violated the Act by failing in its affirmative duty, under Government Code section (k) (former Gov. Code §12940, subd (i)), to take all reasonable steps to prevent discrimination from occurring. Respondent has an ongoing obligation, independent of any claim or proof of discrimination, to take all reasonable steps necessary to prevent discrimination. (Gov. Code, §12940, subd. (k).)

Respondent demonstrated that it has an anti-discrimination and anti-harassment policy and conducts frequent trainings to prevent discrimination and harassment from occurring. The Department presented no evidence on this issue. The Department did not establish that respondent violated Government Code section 12940, subdivision (k).

ORDER

The accusation is dismissed.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: September 17, 2002

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ANN M. NOEL
Hearing Officer